COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034408-99**

John J. Larkin	Employee
Feeney's Fence, Inc.	Employer
Legion Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Carroll and Costigan)

APPEARANCES
Matthew F. King, Esq., for the employee
Donald E. Hamill, Jr., Esq., for the insurer

HORAN, J. The insurer appeals the administrative judge's decision denying its discontinuance request, and the application of § 14 penalties against the employee. We reverse the administrative judge's finding of a causally related incapacity from and after February 14, 2003,[1] vacate the award of weekly incapacity and medical benefits thereafter, and affirm on the issue of § 14 penalties.

The insurer initially accepted the employee's claim, commencing the payment of § 34[2] benefits shortly after he injured his back lifting at work on August 16, 1999. (Dec. 7.) At the conference on the insurer's request to discontinue or modify benefits, and on its claim for penalties, the judge assigned an earning capacity awarding the employee § 35[3] benefits at the maximum rate. (Dec. 3.) He denied the insurer's claim for penalties; both parties appealed to a full evidentiary hearing. Id.

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[1] This is the date the insurer, at hearing and without objection, first raised the § 1(7A) issue. Cf. Cubellis v. Mozzarella House, 9 Mass. Workers' Comp. Rep. 354 (1995).

[2] Total incapacity benefits.

[3] Partial incapacity benefits.

The issues at hearing included the extent of disability causally related to the industrial injury, including § 1(7A), and whether penalties could be properly assessed against the employee under § 14(1) and (2). Id.

In his hearing decision the judge denied the application of §§ 14(1) and (2), found the employee met his causation burden under § 1(7A), and awarded ongoing § 35 benefits. The insurer raises two issues on appeal.

First, the insurer maintains the employee failed to satisfy the elevated standard of causation under § 1(7A) which provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease *remains a major* but not necessarily predominant cause of disability or need for treatment.

G. L. c. 152, § 1(7A). (Emphasis added.) The judge credited Dr. McConville's[4] opinion that the employee suffered from a lumbosacral instability, with a grade 1 spondylolisthesis, and further that the employee's condition was aggravated by the work injury. (Dec. 7-8.) The judge also adopted Dr. McConville's opinion that the employee's lifting incident at work "was sufficient to cause a completely non symptomatic underlying spondylolisthesis to become painful," and that it "was medically possible that the aggravation could have remained a contributing factor to the employee's symptoms . . . "[5] (Dec. 8.) Dr. McConville did not opine, however, that the work injury remained a major

[4] Dr. McConville was the § 11A impartial medical examiner. After his impartial examination of the employee, but before his deposition, the doctor examined Mr. Larkin on behalf of the insurer. The dissent is concerned with the issue of the doctor's impartiality, but the parties are not. No attempt was made to disqualify the doctor's participation in this case once the parties became aware of his involvement for the insurer. While the employee certainly had a basis for objecting, he chose not to do so. In short, this issue is simply not before us on appeal.

[5] Thus, the judge credited evidence of a prior non-industrial condition which combined with the industrial accident to cause disability. The dissent notes the § 1(7A) issue was not raised at conference. This fact is unimportant, given the employee's failure to object to its inclusion as an issue at hearing. Further, once raised, the employee has not challenged the factual predicates of its application at hearing, or on appeal to this panel.

cause of the employee's present disability. (Dec. 8.) Therefore, in order to support his award of benefits, the judge turned his attention to the other medical evidence of record.

The judge's review of the medical evidence revealed that the employee had failed to introduce any medical evidence to satisfy the § 1(7A) standard. The insurer, however, had submitted into evidence a medical report from Dr. Bruce Derbyshire, which addressed causation. (Dec. 9.) The judge's reliance on Dr. Derbyshire's opinion has the insurer crying foul. While the judge was free to rely on the opinion, regardless of its sponsor's identity, the issue in this case turns on whether that opinion was sufficient to satisfy the § 1(7A) causation standard. As neither party opted to depose Dr. Derbyshire, we turn to an examination of his reported opinion. [6]

The judge found the following language in Dr. Derbyshire's report satisfied the employee's burden of proof under § 1(7A): "It would appear that the incident at work was simply the straw that broke the camel's back." (Dec. 9, Ins. Ex. 7 at 3.) In his hearing decision, the judge wrote: "I adopt the opinion of insurer's examining doctor Bruce Derbyshire, M.D., that the events at work were the straw that broke the camel's back. I find that the back has remained broken, that insurer accepted the employee's condition and that it continues unabated and related." (Dec. 9.)

The employee does not dispute that competent medical evidence on the issue of causation is necessary to support the award of benefits. In nearly all instances, it is beyond the expertise of an administrative judge to find causation in the absence of a legally sufficient medical opinion.[7]

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[6] Dr. Derbyshire's report was dated April 15, 2003. He also authored a prior report dated August 1, 2002, but the judge makes no mention of it in his decision; the prior report contains no language which would even arguably support a finding in favor of the employee on the § 1(7A) causation standard. The employee does not cite to any other medical evidence of record which could support an award of benefits under § 1(7A).

[7] Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000)(employee must prove "the requisite causal connection between [his] injury" and his work, and "cannot prevail if any critical element is left to surmise, conjecture or speculation or otherwise lacks evidential support"); Pandey v. Montgomery Rose Co., Inc., 15 Mass. Workers' Comp. Rep. 442 (2001)(reviewing board reversed award as administrative judge improperly held the impartial examiner's opinion that the employee's work was "a minor contributing cause" satisfied § 1(7A)

The employee argues the judge's reliance on the phrase, "the straw that broke the camel's back," is sufficiently synonymous with "remains a major cause," in part because the insurer initially accepted liability for the injury. In other words, the employee maintains that since the insurer initially accepted the case, *and* since Dr. Derbyshire said the work injury was the proverbial "last straw," *and* because he said so on April 15, 2003, then he *must* have meant the work injury *remained* a major cause of the employee's present disability. The employee's argument is creative, but flawed.

An insurer's initial acceptance of a case does not deprive it of the opportunity to raise the issue of § 1(7A) thereafter. To so hold would render the legislature's inclusion of the word "remains" meaningless. Its use obviously contemplates a comparison of the employee's present condition to an earlier time. When an insurer, as here, relies upon medical evidence that the employee suffered from a prior non-industrial medical condition, and the prior condition combines with a subsequent industrial injury to produce a disability, the burden of proof under § 1(7A) rests squarely with the employee.[8]

> There is no dispute that the employee has the burden of proof on a properly raised "major cause" defense under G. L. c. 152, § 1(7A). To the extent that an employee, by a failure to move for the introduction of additional medical testimony or otherwise, fails to convince the fact finder that her disability . . . comes about as the result of a "major cause" attributable to a compensable injury, that employee cannot prevail in the workers' compensation context."

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standard); aff'd., Lalita Pandey's Case, 62 Mass. App. Ct. 1115 (2004)("[W]e are not persuaded by the employee's proposition that the reviewing board improperly made findings of fact. The reviewing board did what it is supposed to do, i.e., review the administrative judge's findings to determine whether they have evidentiary support").

[8] The dissent's reliance upon the opinion of Dr. Alemian, whose report was used by the insurer to support its complaint for discontinuance/modification, is misplaced. The record reveals that Dr. Alemian's opinion was not entered into evidence at the hearing. In any event, his opinion, "I do not feel that the temporary aggravation has resolved," fails to address whether the industrial accident remained "a major" cause of the employee's disability. Kryger v. Victory Distribution, Mass. App. Ct., No. 2003 – J – 144, slip. op. at 3 (February 23, 2005)(single justice)("[s]ection 1(7A) requires more than a showing that an incident aggravated an underlying condition").

Lyons v. Chapin Ctr., Mass. App. Ct., No. 2003 – J – 73, slip op. at 3 (Feb. 16, 2005) (single justice).[9]

The causation paradigm in § 1(7A) is akin to a Bactrian camel, not a dromedary.[10] Just as there are two humps on a Bactrian, the statute places a double burden on the employee: the work injury must *both* remain causative, *and* be deemed "a major" component of the employee's ongoing disability. Kryger, supra, slip. op. at 3-4 (§ 1(7A) requires "proof of ongoing causal relationship over the relevant time period in dispute and evidence of the incident's relative weight as such a causative factor"). We do not accept the argument that Dr. Derbyshire's statement, "[i]t would appear that the incident at work was simply the straw that broke the camel's back," sufficiently supports the judge's conclusion that the work injury "remains a major" cause of the employee's ongoing disability.[11] (Dec. 9.) A doctor's opinion that "A" is a contributory cause of "B," does not mean that "A" is also a major cause of "B". As we stated in our decision in Lyons v. Chapin Ctr., 17 Mass. Workers' Comp. Rep. 7 (2003), and which analysis was not affected by the single justice's action:

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[9] The Appeals Court in Lyons noted the administrative judge had failed to mention § 1(7A) in his decision, and therefore made no findings concerning its application. Lyons, supra. This case is distinguishable, as the parties do not dispute that the standard applies, and the judge did make findings based upon the medical evidence of record. We are concerned here with the legal sufficiency of the opinion adopted by the judge to satisfy the employee's burden under § 1(7A).

[10] This is certainly true in cases, such as this, where the insurer initially accepts liability, and thereafter challenges the employee's continued entitlement to benefits. The legislature's inclusion of the word "remains" would appear to have no practical application where the sole issue is original causation.

[11] The use by the doctor of the past tense supports the view that he was not contemplating causal relationship that presently "remains"; nor does the phrase at issue, insofar as it expresses a cause and effect, address the *degree* of causation at a later point in time. A "last straw" opinion may satisfy a "but for" causation standard. However, when a judge takes this statement of simple contributory causation, and then jumps to the conclusion that "the back has remained broken, that insurer accepted the employee's condition and that it continues unabated and *related*," (Dec. 9, emphasis added), his conclusion is arbitrary and capricious. It is faulty because it considers diagnosis ("the employee's condition") and disability ("continues unabated and related") without regard to the heightened "a major" causation standard of § 1(7A).

> Nearly all § 1(7A) cases present as a work injury "waking up" an underlying, previously asymptomatic, pre-existing condition. In other words, § 1(7A) combination cases are *necessarily* about the work as a "trigger" for the emergence of medical disability and need for treatment that is, at its core, related to an underlying condition. If that, in and of itself, is a sufficient factual foundation for an administrative judge to find "a major" causation under § 1(7A), the pertinent statutory language is rendered meaningless.

Id., at 12. (Emphasis original.) Accordingly, we hold that Dr. Derbyshire's opinion fails as a matter of law to carry the employee's burden of proving that the industrial accident "remains a major" cause of his disability under § 1(7A).[12] The employee's reliance on the *obiter dictum*[13] in Hammond v. Merit Rating Bd., 9 Mass. Workers' Comp. Rep. 708, 710 (1995) is misplaced.[14]

Therefore, we vacate the award of weekly incapacity and medical benefits from February 14, 2003,[15] as contrary to law. G. L. c. 152, § 11C.

The insurer's second contention is that the judge failed to consider evidence the employee violated § 14(1) and (2). Our review of the decision satisfies us the judge did

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[12] In light of our opinion, the dissent urges that the case "be remanded to provide an opportunity to submit new medical evidence." There is no reason to do so. The record reveals that the judge allowed and received additional medical evidence from both parties a month prior to issuing his decision. (See Employee Ex. 7 and Insurer Ex. 7 noted at Dec. 2.) The insurer's materials included Dr. Derbyshire's report. The employee submitted voluminous records and reports, none of which addressed the issue of § 1(7A) causation. See n.4, supra. Those records do, however, contain repeated references to the employee's underlying lumbar degenerative disc disease, spondylolysis and spondylolisthesis.

[13] "Word of an opinion entirely unnecessary for the decision of the case." Black's Law Dictionary (6th ed. 1990).

[14] Since the phrase, "the straw that broke the camel's back," first appeared in dicta, Hammond, supra, we have referred to the phrase in four opinions. See Siano v. Specialty Bolt and Screw, Inc., 16 Mass. Workers' Comp. Rep. 237, 240 (2002)(Hammond cited in passing; medical testimony of "moderately significant" cause sufficient under § 1(7A)); Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 132 (2002); Piekarski v. National Non-Wovens, 14 Mass. Workers' Comp. Rep. 407, 410 (2000)(reversing judge's finding of "a major" cause on Hammond-type medical evidence); Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 195 (1996). We have never adopted the phrase as legally sufficient to satisfy any component of § 1(7A).

[15] See n.1, supra.

consider and reject the insurer's evidence on this point. The decision of the administrative judge is summarily affirmed with respect to those issues.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

CARROLL J., (dissenting). Because the administrative judge's findings and conclusions are supported by the evidence in the record, untainted by error of law and reflect rational decision making under G. L. c. 152, I would affirm.

The insurer accepted liability and paid incapacity benefits. In October 2000, it filed a complaint to modify or discontinue benefits, giving as its only 'Specific Factual Basis' for the complaint the "attached report of Dr. Alemian dated September 12, 2000 stating the employee has a work capacity." Dr. Alemian specifically stated in that report, "I do not feel that the temporary aggravation has resolved." (September 12, 2000 report of Dr. Alemian, p. 3, attached to Insurer's Complaint for Modification, Discontinuance or Recoupment of Compensation, received by DIA Claims October 2000). At conference, the insurer did not raise § 1(7A). (See Temporary Conference Memorandum cover sheet dated March 20, 2001 and "Last Best Offer").[16]

[16] Judicial notice is taken of these documents in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). The insurer admitted the employee had a disability sufficiently related to his industrial injury, i.e. industrial injury 'a major' cause, such that it paid and continued to pay on an accepted basis until it filed a complaint. In filing its complaint to modify or discontinue benefits, the insurer and its supporting documentation (Dr. Almenian's report) never allege that the employee's ongoing condition is anything less than 'a' major – the insurer and Dr. Alemian just say the employee no longer has an impediment to earn income. At conference, the insurer still admits whatever disability exists has as its major cause – the industrial injury. How do we know this? Because the insurer filled out and signed a Conference Memorandum and did not raise § 1(7A) seeking to change benefits. Through conference the admission remained in place, until for the first time, § 1(7A) was raised at hearing. Dr. Alemian's report relates to the issue of when the insurer first disputed 'a major', not to the evidence at hearing.

At hearing, the insurer raised the issue of whether the employee's compensable injury . . . *remains a major . . . cause of disability* . . . under §1(7A). The insurer, through its acceptance of liability, had admitted that the industrial injury was a major cause of the employee's disability and need for treatment, and continued with that admission through the date of the hearing. (See n.13.) The impartial physician examined the employee twice, in August 2001, and again in January 2003. His opinion remained the same as to the physical restrictions necessary and he did not opine that there was any interruption in a continuum of disability going back to the on-the-job aggravation of the pre-existing condition. However, Dr. McConville was uncomfortable and declined to directly address the question as to whether the incident remained, or for more than a short period of time was, a major but not necessarily predominant cause of this disability. Nor was that issue squarely or head-on addressed by the other medical experts. The administrative judge had to evaluate the totality of the opinions and, doing so, concluded that together they could mean, and he found as fact, that the industrial incident remained a major cause of the ongoing condition. I would rule that the interpretation could be made from the whole of the evidence and that we should not disturb his findings and conclusion. Similarly to the concern the single justice expressed in remanding Lyons' Case, No. 2003 – J - 73 (Mass. App. Ct., Feb. 16, 2005), the majority here is again being too restrictive in its view of the parameters allowed for the administrative judge's interpretation of the medical evidence.[17]

But the administrative judge's conclusion should be upheld for another reason as well. The combination of the insurer's admission of the necessary nexus between the injury and the disability, through its acceptance of liability, and expert opinion showing an uninterrupted continuum of disability and limitations, ought to be seen as sufficient to meet the employee's burden that the industrial injury remains a major cause of the

[17] "The majority opinion in Lyons v. Chapin Center, 17 Mass. Workers' Comp. Rep. 7 (2003) has been reversed in part by the . . . decision of the [Appeals Court] and should no longer be relied upon by litigants." Viera v. D'Agostino Associates, 19 Mass. Workers' Comp. Rep. ____, n.1. (March 15, 2005) I have some concerns with the majority's continued reliance on the now

disability. The administrative judge should be free to make that conclusion. The judge should be free to rely on that combination of admission and expert opinion, and reject that aspect of the opinion of the impartial physician where the impartial doctor does not find, or declines to accept, that the injury ever was a major cause of the disability, despite the insurer's admission of that through its acceptance of liability.

The majority is concerned that we not render the word "remains" meaningless by placing undue weight on the acceptance of liability. I share that concern. For that reason, I would require expert evidence showing a continuum of disability uninterrupted from that condition for which the insurer admitted responsibility. Rather, I worry that the majority is too easily allowing the insurer to completely escape the consequences of its earlier admission of causal relationship.

The reality here is that the administrative judge found there is expert evidence to show that nothing has changed for Mr. Larkin and that he continues to have disability from the same continuum of condition for which the insurer had admitted responsibility. We should not be making our interpretation of § 1(7A) so abstract as to create a disconnect with that reality. The administrative judge's decision should be affirmed.

If the administrative judge is not to be affirmed, then the matter should be remanded to provide an opportunity to submit the medical evidence which the employee felt would be of 'significant importance' to his case. (June 10, 2003, employee's request to submit further evidence). This impartial physician allowed his status to be tainted by accepting employment with the insurer on this very case. Between his Department of Industrial Accidents (DIA)-sponsored examination, and his cross-examination by the parties, Dr. McConville was hired by, and presumably received remuneration from, this insurer to examine this employee with regard to this matter. If Mr. Larkin is to be deemed to have failed to meet his burden because the opinion of Dr. McConville did not go with him, how can his loss be seen as fair where the supposed "impartial" physician was employed by the insurer.

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reversed and remanded Lyons' case and would wait until it has wound its way back to the administrative judge to whom it has been remanded.

Several times, the employee broached this subject with the administrative judge and did not receive adequate satisfaction (See "Employee's Motion to Find M.G.L. c. 152, § 11A Medical Report Inadequate," arguing the opinions of Dr. McConville should be given no weight; Employee's June 10, 2003 request for a brief extension of time to submit further medical evidence, again discussing Dr. McConville's dual role and the 'significant importance' of the additional opinions expected; June 19, 2003 Motion for Reconsideration, and Closing Argument of the Employee, Rizzo, supra.) While we prefer issues to be raised by the party on appeal, here that wouldn't be expected because the employee was not the appellant and was before us to support his win at hearing. If we are going to turn the hearing result on its head, we have to be cognizant of the fact that the employee repeatedly took issue with the tainted 'impartial'. Moreover, there are other circumstances where we have excluded the impartial when we have felt that fairness and justice required it. Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342, 344 (2003) (although not argued, the impartial physician's illegitimate judgment on employee credibility rendered the doctor's opinion so flawed as to require its exclusion).

I would affirm the decision, but if merit were found in the insurer's appeal, I would see remand as the appropriate remedy rather than reversal.

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Martine Carroll
Administrative Law Judge

Filed: April 4, 2005